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The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Commercial Energies, Inc.

**File:** B-234789

**Date:** July 12, 1989

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### DIGEST

Contracting agency's decision to set aside natural gas procurement for small businesses rather than for small disadvantaged business (SDB) concerns was proper where based upon prior procurement history for natural gas contracts, contracting officer determined that there was not a reasonable expectation that offers would be obtained from two responsible SDB firms at prices not exceeding the fair market price by more than 10 percent.

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### DECISION

Commercial Energies, Inc. (CEI), protests the Department of the Navy's decision to issue invitation for bids (IFB) No. N62474-89-B-6986, for supplying natural gas to the Naval Public Works Center, San Diego, California, and the Marine Corps Base, Camp Pendleton, California, as a total small business set-aside rather than as a small disadvantaged business (SDB) set-aside. CEI contends that the contracting agency's decision not to issue the IFB as an SDB set-aside was contrary to Department of Defense (DOD) Federal Acquisition Regulation Supplement (DFARS) § 219.504 (1988 ed.) which places SDB set-asides first in order of precedence for set-asides.

We deny the protest.

SDB set-asides serve a purpose similar to small business set-asides by ensuring equitable opportunities for SDB participation in government acquisitions. Alamo Acoustical Restoration Co., B-228429.2, Feb. 16, 1988, 88-1 CPD ¶ 150. This special category of small business set-asides was established for DOD by section 1207 of the National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661, 100 Stat. 3816 (1986), which also established a goal for DOD of awards to SDBs of 5 percent of the dollar value of total contracts to be awarded during fiscal years 1987, 1988, and

C-5957/139082

1989. See Abbott Products, Inc., B-231131, Aug. 8, 1988, 88-2 CPD ¶ 119. DOD's implementing regulations are set forth in DFARS part 219.

The DFARS provides that a procurement shall be set aside for exclusive SDB participation if the contracting officer determines that there is a reasonable expectation that (1) offers will be obtained from at least two responsible SDB concerns, and (2) award will be made at a price not exceeding the fair market price by more than 10 percent. DFARS § 219.502-72(a). The DFARS also states that the contracting officer should presume that these requirements are met if the acquisition history shows that: (1) within the past 12-month period, a responsive offer from at least one responsible SDB concern was within 10 percent of an award price on a previous procurement of similar supplies or services, and (2) the contracting officer has reason to know (from the activity's relevant solicitation mailing list, responses to presolicitation notices, or from other sufficient factual information) that there is at least one other responsible SDB source of similar supplies or services. DFARS § 219.502-72(c).

CEI contends that, under the DFARS, the contracting officer was required to set aside the present procurement for exclusive SDB participation because there was a reasonable expectation that offers would be obtained from at least two responsible SDB concerns. CEI states that, after the IFB was issued, it expressed to the contracting officer its interest in competing for this contract on the basis of an SDB set-aside and told the contracting officer that there were other SDB firms that were also engaged in selling natural gas. The protester points out that the two most recent Navy procurements for natural gas each had resulted in submission of offers from at least two SDBs.

The Navy reports that the contracting officer considered the possibility of setting aside the present procurement for exclusive SDB participation. However, the Navy argues that, based upon the most recent acquisition history, the contracting officer properly determined that there was not a reasonable expectation that offers would be received from at least two responsible SDB firms nor that award under an SDB set-aside would be made at a price that did not exceed the fair market price by 10 percent.

The acquisition history relied upon by the contracting officer in deciding not to issue the IFB as an SDB set-aside consisted of two Navy procurements for natural gas conducted in the past 12 months. The first procurement considered was the most recent solicitation for natural gas at Camp

Pendleton and the Naval Public Works Center, San Diego. While two SDBs submitted bids in response to the solicitation, the Navy rejected both bids as nonresponsive. The second procurement relied upon by the contracting officer, for the supply of natural gas to the Naval Shipyard, Long Beach, California, resulted in bids from four firms that identified themselves as SDBs. However, the Navy reports that the Small Business Administration ruled that one of those firms was not, in fact, an SDB, and the Navy rejected two SDB bids as nonresponsive. The Navy reports that the sole remaining SDB bid was approximately 16 percent higher than the awardee's bid price.

Thus, as the last two Navy procurements for natural gas resulted in only one responsive bid from an SDB and that bid was more than 10 percent above the award price, the Navy contends that the contracting officer was not required to presume, in accord with DFARS § 219.502-72(c)(1), that offers would be obtained from at least two responsible SDB concerns. The Navy also argues that, because none of the competing SDB firms was the lowest bidder on either of the two most recent natural gas procurements, no determination was made that any of the SDB concerns was responsible. Therefore, the Navy asserts that the contracting officer did not have sufficient factual information to identify at least two responsible SDB sources as required under DFARS § 219.502-72(c)(2). Accordingly, the Navy maintains that the contracting officer's decision to set this procurement aside for small businesses rather than SDB concerns was proper and in compliance with the DFARS.


The decision to conduct a particular procurement as an SDB or a small business set-aside is a business judgment within the discretion of the contracting officer. See Superior Engineering and Electronics Co., Inc., B-231772, Aug. 31, 1988, 88-2 CPD ¶ 197. This Office will not disturb a contracting officer's set-aside determination unless there has been a clear showing of an abuse of that discretion. See Techplan Corp.; American Maintenance Co., 67 Comp. Gen. 357 (1988), 88-1 CPD ¶ 312. Here, in our view, the contracting officer reasonably determined, based upon the recent acquisition history for natural gas contracts, that there was not a reasonable expectation that bids would be received from two responsible SDB concerns whose bid prices would be within 10 percent of the fair market price.

Of the five actual SDB bidders in the two prior procurements, only one firm submitted a responsive bid, and that responsive bid was 16 percent higher than the winning bid. Thus, in accord with DFARS § 219.502-72(c), the contracting officer did not have to presume that there would be two

responsible SDB concerns that would bid on the present procurement or that award under an SDB set-aside would be made at a price not exceeding the fair market price by more than 10 percent. Furthermore, as the Navy points out, no responsibility determinations were made with regard to any of the SDB bidders on the last two natural gas procurements, and there is nothing in the record to show that the contracting officer should have known from other factual information that any of the known SDBs were responsible sources of supply. Finally, the record shows that the contracting officer consulted with the Small and Disadvantaged Business Utilization Specialist (SADBUS) as part of his consideration of whether to set aside the procurement for small businesses or SDBs. The SADBUS recommended that the procurement be set aside for exclusive small business participation, and, after considering the procurement history, the contracting office concurred in this recommendation. Such consultation between the contracting officer and the SADBUS was entirely appropriate and, in fact, is required under the DFARS. See DFARS § 219.501(c).

In these circumstances, we find that the Navy's decision not to set the procurement aside for exclusive SDB participation was proper.

The protest is denied.

  
James F. Hinchman  
General Counsel